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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

R. E. GRAHAM and E. E. FOSTER, copartners, doing business under the firm name of Millie Francis Oil Company, a copartnership,

Petitioners,

vs.

REX B. GOODCELL, former Collector of Internal Revenue of the United States of America, in and for the Sixth Collection District, State of California.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF.

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Petitioners,

against

REX B. GOODCELL, former collector of Internal Revenue of the United States of America, in and for the Sixth Collection District, State of California.

No. 36.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*.

The undersigned respectfully moves the Court for leave to file the accompanying brief in this case as *amicus curiae*.

This application is made as counsel for Marshall-Wells Company, a corporation of Duluth, Minnesota, which now has pending before the United States Court of Claims a suit for the recovery of 1917 income taxes in which suit

are presented two of the important questions presented in this case, namely whether Section 611 of the Revenue Act of 1928 is applicable to a state of facts such as the facts in this case, and if so whether Section 611 as so applied is constitutional. As in this case, the taxes in the Marshall-Wells Company case were collected after the expiration of the five year statute of limitations and the abatement claim filed by the Company was rejected prior to the expiration of the statute of limitations. Marshall-Wells Company, therefore, has as vital an interest in this case as the petitioners herein.

WHEREFORE, leave to file the accompanying brief is respectfully requested.

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No. 36.

BRIEF IN SUPPORT OF PETITIONERS.

Statement.

The petitioners filed their income and profits tax return for the year 1917 on March 22, 1918, and paid the taxes shown thereon to be due. In January, 1920, the Commissioner of Internal Revenue assessed additional 1917 taxes against the petitioners in the amount of $7,034.71. On February 11, 1920, the petitioners filed a claim in abatement of the additional assessment. On December 27, 1922, the abatement claim was rejected. The five year statute of limitations barred the respondent's right to collect the said additional taxes on March 22, 1923. The additional taxes were collected in two installments, one on November

29, 1924, and the other on December 3, 1924. Thereafter the petitioners duly filed a claim for refund and upon rejection brought suit to recover the said additional taxes on the ground that the collection of same was illegal because made after the expiration of the five year statute of limitations. The court below held that by reason of the filing of the aforesaid abatement claim petitioners were precluded from recovery by Section 611 of the Revenue Act of 1928.

Questions Presented.

Should Section 611 of the Revenue Act of 1928, by reason of the filing of the abatement claim, be construed to preclude petitioners' right to recover the additional taxes in suit; and if so is Section 611 constitutional when so construed?

The Statutes.

Revenue Act of 1928:

> *Section 607.* "Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."
>
> *Section 611.* "If any internal-revenue tax (or any interest, penalty, additional amount or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed,

with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of Section 607, relating to payments made after the expiration of the period of limitation on assessment and collection."

ARGUMENT.

I.

Section 611 does not apply to this case because here the abatement claim was rejected before the statute of limitations had run.

It is respectfully submitted that Section 611 of the Revenue Act of 1928 is not applicable to the case at bar because here the abatement claim was rejected and disposed of before the statute of limitations had run on the collection of the tax. Section 611 was intended to and should be construed to apply only to those cases where the abatement claim stayed the collection of the tax until after the statute had run.

In this case the return for 1927 was filed on March 22, 1918. The taxes in suit were assessed in January, 1920. The abatement claim was filed on February 11, 1920, and was rejected on December 27, 1922. The statute of limitations on the collection of the tax did not expire until March 22, 1923. The tax was not collected until November and December, 1924. Thus the abatement claim was rejected and out of the case three months before the statute expired and two years before the tax was collected.

The purpose of Section 611 was to prohibit recovery in those cases where the statute of limitations had run against the collection of taxes *while abatement claims were pending.* The practice of the Treasury Department had been to delay collection of taxes until claims in abatement could be acted upon, it being assumed at that time that there was no limitation on collection once the assessment was made. This assumption was held erroneous in *Bowers* v. *N. Y. & Albany Lighterage Co.,* 273 U. S. 346, the result being in many cases that the limitation on collection expired while the claim in abatement was pending. It was considered unjust that a taxpayer should be permitted to recover a tax on the ground that it was collected after the running of the statute when in fact the statute expired while the collection of the tax was stayed by an abatement claim filed by the taxpayer. To meet this situation Section 611 was enacted. See *Regla Coal Co.* v. *Bowers,* 37 Fed. (2d) 373, also *Oak Worsted Mills* v. *U. S.,* U. S. Crt. Cls. 36 Fed. (2d) 529 and *Daniel Reeves, Inc.* v. *Anderson,* C. C. A. 2nd Cir. July 21, 1930.

In view of its purpose, Section 611 should have no application to a case such as the instant one where the delay in collection was due to reason other than the filing of an abatement claim. In this case final action was taken on the abatement claim in December, 1922. The tax was not collected until November and December, 1924. The statute of limitations did not expire while the claim was pending. It did not expire until three months after the claim was rejected. After the claim was rejected the Government delayed collection for two years. The delay after rejection of the abatement claim was not interposed by the petitioners. It was a voluntary delay by the government for which the petitioners cannot be held responsible.

Section 611 was intended as an estoppel to those taxpayers whose abatement claims were pending until after the statute of limitations had run against collection. Its object was to estop a taxpayer from relying on the statute of limitations for recovery when by his own act in filing and prosecuting an abatement claim he sought and obtained a stay of collection *until the statute had run.* The section was intended to apply only

> "to those cases where the taxpayer by filing a plea in abatement had succeeded in delaying the case over the period of limitations and then sought to take advantage of the favor that had been granted him."

Oak Worsted Mills v. *U. S., supra; Wright & Taylor, Inc.* v. *Lucas,* 34 Fed. (2) 328. The petitioners were not such a taxpayer for in this case the abatement claim was disposed of several months before the statute expired.

The stay referred to in Section 611 means a stay due to and in fact resulting from an abatement claim filed by the taxpayer. *Regla Coal Co.* v. *Bowers, supra.* A stay or delay due to any other cause is not comprehended by the Section. This is the official interpretation placed upon the Section by the Treasury Department. In published rulings of the General Counsel of the Bureau of Internal Revenue (G. C. M. 4879, C. B. VII.—2, page 90, and G. C. M. 5665 C. B. VIII—1 p. 130) it is held that Section 611 does not apply when collection of the tax became barred prior to the date of the filing of the abatement claim. The General Counsel says:

> "The filing of a claim in abatement does not in and of itself satisfy the provisions of that section (Section 611). Its provisions are applicable only if

a timely assessment was made prior to June 2, 1924, and *if upon the filing of a claim in abatement, collection was stayed.* Here such a timely assessment was made, but collection of the tax became barred prior to the date of the filing of the claim. Consequently the legal right to enforce collection of the tax was never stayed, as the result of the claim being filed. The phrase 'collection * * * was stayed' as used in Section 611 clearing presupposes the legal right to collect, and the provisions of that section are not applicable when, if payment had been made at the time of the filing of the claim, it would have constituted an overpayment of the tax as defined by section 607." G. C. M. 4879, *supra.*

If no abatement claim is filed or if an abatement claim is filed but does not stay the collection, Section 611 does not apply. It follows that when, as in the present case, an abatement claim is filed *but is rejected several months before the statute runs* Section 611 should not apply.

The rule laid down by Section 611 is directed to a certain class of cases and the Section should not be applied to the present case which is clearly outside that class. The reason for the rule is known and the rule should not be applied where the reason for the rule does not exist.

II.

If Section 611 applies to this case, the Section is unconstitutional.

Section 611 arbitrarily and unreasonably discriminates between taxpayers of the same class, if it applies to facts in this case. It violates the constitutional requirement that all persons similarly circumstanced must be treated alike.

The government contends that it purports to ratify illegal exactions made *before* its enactment but must admit that it fails to authorize the collection of similar taxes *after* its enactment. Under this construction of its provisions a taxpayer, such as the petitioners, who paid the illegal tax on the demand of the collector is barred of recovery, while another taxpayer, identically situated except that he failed or refused to pay the tax up to the time of enactment of Section 611, is not required to pay. That such is the case appears clearly from the legislative reports when the bill was pending.

The following is a part of the report of the Conference Committee of the Senate and House on this section of the 1928 Act (H. R. Report No. 1882, 70th Congress, 1st Session, pp. 22-23):

> "Amendment No. 190: The House bill (sec. 611) provided that in cases in which a tax was assessed within the period of limitation upon assessments and thereafter (whether before or after the expiration of such period) a claim in abatement was filed, with or without a bond, and if proceedings for the collection of the tax were not promptly instituted (as would have been the case had the claim in abatement not been filed), then (1) if any part of the amount covered by the claim in abatement was thereafter *paid*, such amount should not be refunded, solely because of the fact that it was paid after the running of the statute, *and (2) in cases where the amount was not paid, it could be collected by distraint or proceedings in court begun within one year after the enactment of the new law. The Senate amendment struck out this section; and the House recedes with an amendment retaining the prohibition upon refunds, as above described, and eliminating the authority for collection.*"

Section 611 as finally enacted did not purport to, was not intended to, and does not authorize the *collection* of a barred tax. The Bill as it left the House contained such a provision in the following language:

> "(b) A distraint or a proceeding in court for the collection of such part may be begun within one year after the enactment of this Act."

But that provision was purposely omitted from the final Bill. It was stricken out by the Senate because of its doubtful constitutionality. This appears from the debates in the House and in a statement by the ranking Democratic Member of the Ways and Means Committee, Representative Garner of Texas, referring to the effect in dollars and cents of Section 611 as originally proposed and as finally enacted. (Congressional Record, Vol. 69, p. 10136):

> "• • • It meant $30,000,000 refund of taxes and $70,000,000 to be collected in the future from taxpayers. That was the basis of the $100,000,000 loss. When we got into conference we could not get the Senate to recede. We finally tied up on two questions—the furniture outfit and 611. I believe in telling how we do these things. We tied up on them. We wanted the Senate to recede from both, but they did not want to recede because some particularly selfish people were going to get the money. We do not believe in that, but the Senate does. The result is that we compromised. We made it 'original', and then we struck out subsection (b) of section 611, cutting out the $70,000,000 prospectively we were going to get, *because there was some doubt about the constitutionality of it*, and decided to keep the $30,000,000 that we had in the Treasury. That was the compromise between those two amendments, one of them cutting down and the other giving up the prospect of securing $70,000,000 in the future."

The $30,000,000 refund referred to taxes already paid and the $70,000,000 referred to collections authorized by the original draft. Because of constitutional doubts the final bill dropped the collection of the $70,000,000 but authorized the retention of the $30,000,000 already paid.

That Section 611 does not authorize the collection of barred taxes is recognized by the Treasury Department in an official ruling, Mimeograph 3660, published in Internal Revenue Cumulative Bulletin, VIII-2, at p. 821, which provides in part as follows:

> "Section 607 and 611 do not authorize the Bureau *to enforce* collection of a tax *in any case* after the expiration of the period of limitation, but merely prescribe the effect of the period of limitation against the United States upon any assessment or payment made after the expiration of the period of limitation applicable thereto. Therefore, no attempt will be made *to enforce* collection of any outstanding assessment if the period of limitation within which collection can be made has expired, or to make any assessment of any tax if the period of limitation within which the assessment can be made has expired, or to enforce collection of any tax if the assessment was not made within the period of limitation prescribed for the making of the assessment and if no suit for collection without assessment was begun prior to the expiration of such period."

The result of Section 611, therefore, is that one taxpayer may not recover a tax collected after the running of the statute of limitations but *before* the enactment of the 1928 Act where an abatement claim was filed and the collection stayed; yet another taxpayer in the same position except that his tax was so stayed until *after* the enactment of the 1928 Act need not pay if the statute of limita-

tions has run. The section thus purports to ratify illegal exactions made before its enactment but fails to authorize the collection of similar taxes after its enactment. The statute would penalize those who respected the demands of the government, and paid, and would put a premium on recalcitrance. Or it may be said, under this statute the lucky escape; the unlucky pay. However good natural law that may be, we respectfully submit it is bad constitutional law.

Consider these cases: Two taxpayers filed their returns for 1917 on the same day in 1918; in 1919 additional taxes were assessed against each; both filed abatement claims and in each case collection was stayed until after the statutory period; both claims were rejected on the same day and demands on both taxpayers were served at once. One was trusting and relied upon the complete system of remedial justice so often referred to by the lower courts and affirmed by this court *vide Graham* v. *Dupont,* 262 U. S. 234. He honored the demand of the Collector, relying upon

> "his right to pay the tax and sue to recover it back and in such a suit to raise the questions * * * as to the bar of time against the assessment * * *."

The other was more astute. He fled the jurisdiction, or perhaps concealed his property. Or again, perhaps, he was merely lucky in that the Collector was not diligent and his case was lost in the thousands on the books for collection. It is notorious that this happened times without number. The first taxpayer is mulcted; by the statute the illegal collection is made legal. The second goes free because after *New York & Albany Lighterage Co.* v. *Bowers,* 273 U. S. 346, decided in February, 1927, no fur-

ther effort to molest him was made by the government and this statute effectively exculpates him.

We say that statute is unconstitutional. The taxpayer such as the petitioners who complied with the Collector's demand and paid the outlawed tax relying on the law announced by the courts is penalized while the taxpayer who skulked and delayed until February, 1927, is favored. The due process clause of the Fifth Amendment commands that Congress shall not so discriminate. There is not the slightest reason or justification, legal or moral, for the different treatment of these two taxpayers—they are in all material respects identically situated in their relations to the government and they must be treated alike. The attempted distinction is purely arbitrary and capricious.

The Constitution guarantees to all persons equal protection of the laws. As to the states this is accomplished by the Fourteenth Amendment and as to the Federal government by the due process clause of the Fifth Amendment. This guarantee requires that classification for taxation must be reasonable and not arbitrary and capricious; that classification must rest upon some ground or difference or distinction having a fair and substantial relation to the object of the legislation. It requires that all persons in the same class or similarly circumstanced shall be treated alike. A tax law is unconstitutional where the classification is illusory, arbitrary or capricious. *Royster Guano Co.* v. *Virginia,* 253 U. S. 412; *Schlesinger* v. *Wisconsin,* 270 U. S. 230; *Barclay* v. *Edwards,* 267 U. S. 442; *Nichols* v. *Coolidge,* 274 U. S. 531; and see *Neuss Hesslein & Co.* v. *Edwards,* 30 Fed. (2) 620.

A tax law which discriminates as Section 611 does against diligent and obedient citizens and operates to the

advantage of those who delay and skulk is obviously whimsical and capricious and must be condemned as unconstitutional. It is as unsound legally as it is reprehensible morally.

Conclusion.

In conclusion, and for the reasons above set forth, it is submitted that Section 611 cannot be construed as applicable to a case such as the instant one where the abatement claim was rejected long before the statute of limitations on collections expired; that when so construed the section is so arbitrary, capricious and discriminatory as to violate constitutional restrictions on the taxing power and is therefore void.

Respectfully submitted,

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October, 1930.